No. 98-591

In The

Supreme Court of the United States

October Term, 1998

ALBERTSONS, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF JAMES STRICKLAND, SR., ET AL., IN SUPPORT OF RESPONDENT

DOUGLAS L. PARKER
Counsel of Record
SUNIL H. MANSUKHANI
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Ste. 312
Washington, DC 20001
(202) 662-9535

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The *amici curiae* will address the following question:

Whether a private employer violates the Americans with Disabilities Act by refusing to hire a truck driver who has a valid Commercial Driver's License solely because that driver has not met a vision standard that the Federal Highway Administration has determined fails to measure a monocular driver's ability to operate a truck safely.

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BRIEF *AMICUS CURIAE* OF JAMES STRICKLAND, SR., ET AL., IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amici James Strickland, Sr., Dorian Holladay, George Hahn, Glenn Gee, Richard Carlson, and David Rauenhorst are all truck drivers with monocular vision who have driven hundreds of thousands of accident-free miles in their careers. However, because of their monocular vision, these drivers are unable to meet the Federal Highway Administration's ("FHWA") vision standard, 49 C.F.R. § 391.41(b)(10) ("vision standard").[2] Meeting the vision standard has been a prerequisite for obtaining a Commercial Driver's License ("CDL") that permits one to drive a truck interstate. However, in 1992 the FHWA introduced a vision waiver program that permitted monocular drivers to obtain a CDL provided they met a variety of other requirements, including having a safe driving record. *Amici* have either obtained or are in the process of applying for vision waivers that would permit them to obtain an interstate CDL. Each of the drivers is discussed more fully below.

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] For purposes of this brief, *amici* will use the term "monocular" to refer to a person who meets the FHWA standard in one eye but not both.

James Strickland, Sr. is a resident of North Carolina who began driving tractor-trailers in 1991. In August of 1993, he lost sight in one eye and could therefore only legally drive trucks intrastate. Since that time, he has driven tractor-trailers 250,000 miles without an accident. In 1995, Mr. Strickland applied for a waiver of the FHWA vision standard. In late 1998, he updated his application, requesting an "exemption" rather than a waiver under the procedures established by the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) ("TEA-21"). TEA-21 reconfirms the authority of the FHWA to grant waivers from its vision standard, but now uses the term "exemption" to describe the type of action Mr. Strickland seeks. He is awaiting the FHWA's decision on his application.

Dorian Holladay, a resident of Arizona, George Hahn, a resident of Wisconsin, and Glenn Gee, a resident of Texas, have also applied for exemptions pursuant to the FHWA regulations that were implemented following the passage of TEA-21. Mr. Holladay, who lost his vision in one eye when he was a child, has driven straight trucks and tractor-trailers for the last 39 years. He has been self-employed since 1988, during which time he has driven over 1 million accident-free miles. Mr. Hahn, who lost his vision in one eye when he was 18, has driven tractor-trailers over 2.5 million accident-free miles over the past 25 years. Mr. Gee, who lost his vision in one eye as a child, has driven both straight trucks and tractor-trailers for the last 29 years. Over this time period, he has driven 1 million accident-free miles.

Richard Carlson, a resident of Minnesota, will soon be granted an exemption by the FHWA. *See* Qualification

of Drivers, Exemption Applications, 63 Fed. Reg. 66226, 66227 (Dec. 1, 1998) (Notice of Intent to Grant Applications). He lost his vision in one eye when he was a child. He has been self-employed for the last ten years, during which time he has driven over 1 million accident-free miles.

David Rauenhorst, a resident of Minnesota, was granted a waiver effective January 9, 1998. *See* Qualification of Drivers, Waiver Application, 63 Fed. Reg. 1524 (Jan. 9, 1998) (Notice of Final Disposition). At the time he applied for a waiver, he had driven for 22 years and 1 million miles without an accident.

Without a FHWA-issued waiver of the vision standard, a monocular driver's employment opportunities are severely restricted since many companies who carry goods interstate are unable to hire these individuals. The vision waiver permits monocular drivers to compete for these jobs on an equal footing with other drivers. However, the waiver will become meaningless if employers are free to disregard CDLs issued to drivers with monocular vision despite the FHWA's findings that these drivers are safe and that it is in the public interest to grant them waivers. As a result, *amici* have a substantial interest in this case. *Amici* respectfully submit this brief to aid the Court's understanding of the history of the vision waiver program and its relationship to the Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act of 1973 ("§ 504"). Both Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The FHWA has adopted certain physical standards that truck drivers must meet in order to obtain an interstate CDL. One of those standards, last revised in 1971, sets out criteria related to vision, and would deny CDLs to drivers whose vision in either eye falls below a certain level. *See* 49 C.F.R. § 391.41(b)(10). In recent years, the FHWA has acknowledged that its 1971 vision standard does not measure the essential functions of the job of driving a truck safely. The FHWA has therefore issued waivers to several thousand monocular drivers, implicitly acknowledging that strict enforcement of its vision standard would discriminate against those drivers in violation of § 504. In issuing those waivers, the FHWA found that the monocular drivers it granted waivers to were as safe as those drivers who met the underlying vision standard itself and that issuance of the waivers would be in the public interest.

Even though Respondent Hallie Kirkingburg had obtained a CDL through the waiver procedure, Petitioner Albertsons refused to hire him. It did so specifically because of his disability. Rather than accepting the FHWA findings that Mr. Kirkingburg was a safe driver, Albertsons insisted that he meet the very vision standard that the FHWA has declined to enforce. Such reliance on a job standard that does not measure the essential functions of the job at issue violates the ADA. Albertsons cannot simply ignore the FHWA's decision and try to enforce a more stringent and discriminatory standard.

The vision waiver program, contrary to Albertsons' claim, was not an "experiment," but rather was a means

of certifying monocular drivers the FHWA knew were safe while gathering unbiased data which would provide the basis for a new vision standard. The FHWA carefully examined what was necessary to drive a truck in interstate commerce and assessed the individual records of each driver to whom it proposed to issue a waiver. That waiver procedure is authorized by the Motor Carrier Safety Act, Pub. L. No. 98-554, 98 Stat. 2832 (1984) ("MCSA"), and by the recently-enacted Transportation Equity Act for the 21st Century. In contrast to the FHWA, Albertsons simply required adherence to an outdated standard, discriminating against Mr. Kirkingburg on the basis of stereotypes and unfounded assumptions. The Ninth Circuit's decision should therefore be affirmed.

ARGUMENT

I. THE FEDERAL HIGHWAY ADMINISTRATION'S VISION STANDARD DOES NOT MEASURE A MONOCULAR DRIVER'S ABILITY TO OPERATE A TRUCK SAFELY.

A. History And Effect Of The Vision Standard

Congress has granted the Department of Transportation ("DOT") the authority to implement policies and programs that contribute to the safety, speed, and efficiency of transportation. *See* 49 U.S.C. § 101. Within the DOT, the FHWA is the agency with the power to regulate motor carrier safety. 49 U.S.C. §§ 104(a), (c). The FHWA develops and implements Federal Motor Carrier Safety Regulations ("FMCSRs") that prohibit unqualified

persons from operating commercial motor vehicles ("CMVs") in interstate commerce. *See* 49 C.F.R. § 391.11(a).

To obtain a CDL to operate a truck in interstate commerce, a driver must meet the criteria of 49 C.F.R. § 383.71, which include skill, knowledge, and certain physical requirements. The physical requirements include 49 C.F.R. § 391.41(b)(10) (the "vision standard"). The vision standard was first implemented in 1937 by the Interstate Commerce Commission. *See* Qualifications of Drivers, 57 Fed. Reg. 6793 (Feb. 28, 1992) (Advance Notice of Proposed Rulemaking). The original standard required "good eyesight in both eyes (either without glasses or by correction with glasses), including adequate perception of red and green colors." *Id.* The vision standard was revised several times over the years to require increased visual acuity. *See id.* at 6793-94. The current vision standard has remained unchanged since 1971 and requires that an individual have:

> [D]istant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

49 C.F.R. § 391.41(b)(10).

The FHWA established the current vision standard to "prevent individuals who will present an unreasonable

and avoidable safety risk to other users of the highways from being allowed to operate vehicles which, because of their size or cargo, present a grave hazard." Qualification of Drivers, 57 Fed. Reg. 10295 (Mar. 25, 1992) (Notice of Intent to Accept Applications for Waivers). Prior to the introduction of the waiver program in 1992 which allowed drivers with good vision in one eye and a proven history of driving safety to obtain CDLs, the FHWA enforced the vision standard as a mandatory prerequisite to receiving an interstate CDL. Drivers who could not meet the vision standard were denied a CDL and could not legally be employed to drive a CMV in interstate commerce.

Furthermore, since 1984 many states have adopted the vision standard in response to the MCSA. *See* Qualification of Drivers, 59 Fed. Reg. 50887, 50888 (Oct. 6, 1994) (Notice of Determination) (stating "Congress has insisted on uniform [state] standards consistent with Federal regulations issued pursuant to the MCSA of 1984 and has authorized programs to encourage states to adopt those standards."). As a result, prior to the 1992 introduction of a vision waiver program, monocular drivers with impeccable safety records were often no longer able to drive at all due to the rigid enforcement of the vision standard. That enforcement had a significant financial impact on monocular drivers, including several of the *amici* since, as the FHWA has recognized, a license to drive a CMV in interstate commerce can increase earning potential. *See* 57 Fed. Reg. 10295.

In 1992, the FHWA finally acknowledged that monocular vision drivers could compensate for their disability and thus drive safely even if they did not meet the vision

standard. Pursuant to its 49 U.S.C. § 31136(e)(1) authority to grant waivers that are consistent with the public interest and the safe operation of CMVs, the FHWA instituted a vision waiver program that permitted monocular CMV operators who had demonstrated safety records to obtain a CDL. By granting vision waivers to drivers it determined to be safe, the FHWA allowed monocular drivers the same opportunities as other drivers while maintaining the current level of highway safety. In 1998, Congress reconfirmed FHWA's authority to grant waivers of the FHWA's physical standards in the Transportation Equity Act for the 21st Century, Pub L. No. 105-178, 112 Stat. 107 (1998); *see also* 63 Fed. Reg. 67600 (Dec. 8, 1998) (Interim Final Rule Implementing TEA-21).

B. Monocular Drivers Can Be Otherwise Qualified To Drive Safely In Interstate Commerce Without Meeting The FHWA Vision Standard.

The FHWA's issuance of the waivers of the vision standard has been integral to the FHWA's ability to regulate highway safety while fulfilling its non-discrimination obligations pursuant to § 504 of the Rehabilitation Act of 1973. As explained below, the vision standard does not measure whether monocular drivers can drive safely, and thus the FHWA would have violated § 504 if it had continued to enforce that standard and deny CDLs to monocular drivers who could operate CMVs safely despite their disability.

§ 504 of the Rehabilitation Act prohibits federal agencies such as the FHWA from discriminating against

individuals based on their disabilities. The Rehabilitation Act provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

To establish a prima facie case of a § 504 violation, a plaintiff must prove (1) that he has a disability; (2) that he is otherwise qualified for the employment in question; and (3) that he was excluded from employment solely on the basis of his disability. *Doe v. Univ. of Maryland Medical System Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995). For purposes of this discussion, *amici* will assume that individuals with monocular vision are individuals with a disability, while recognizing that this issue is before the Court in this case. Furthermore, there is no dispute that the FHWA has in the past denied monocular drivers CDLs solely on the basis of their disability; i.e., because their eyesight could not meet the visual acuity ratings in 49 C.F.R. § 391.41(b)(10). Thus the only determination to be made in assessing the potential discriminatory effect of the FHWA vision standard is whether monocular drivers are otherwise qualified.

Pursuant to § 504, a qualified individual with a disability is "with respect to employment, a handicapped

person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1). FHWA regulations make clear that the function essential to driving a CMV in interstate commerce is the ability to operate a CMV safely. *See* 49 C.F.R. § 383.1 (explaining that CDL standards were promulgated to "help reduce or prevent truck and bus accidents, fatalities, and injuries"); 57 Fed. Reg. at 10295 ("The purpose of establishing vision standards for drivers of CMVs is to prevent individuals who will present an unreasonable and avoidable safety risk to other users of the highways from being allowed to operate vehicles which, because of their size or cargo, present a grave hazard.").

Driving safely in interstate commerce is a general ability that depends on many other specific abilities such as the ability to change lanes properly, use signals appropriately, and monitor the air brake system. *See* 49 C.F.R. § 383.113. In its effort to ensure that only safe drivers are licensed, the FHWA requires CDL applicants to meet the standards set forth in the FMCSRs. The FHWA has assumed that the visual acuity ratings that the FMCSRs require will ensure that only safe drivers are allowed to operate CMVs. The FHWA, however, is also obligated by § 504 to ensure that the vision standard only excludes drivers because they are not safe and not merely because they are monocular.

Therefore, to comply with § 504, the FHWA must ensure that the criteria it imposes to ensure highway safety actually measure whether each individual has the ability to drive safely, which is the essential function of driving a CMV. *See Pandazides v. Virginia Bd. of Educ.*, 946

F.2d 345, 349 (4th Cir. 1991) (holding that qualified individual need only fulfill the requirements of a job that measure the position's essential functions). Essential functions are those functions that are necessary to the successful performance of the job in question; marginal functions are not included. *See Southeastern Community College v. Davis*, 442 U.S. 397, 406-07 (1979). In other words, there must be a close nexus between the essential functions and the job position:

> [D]efendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications. To do otherwise reduces the term "otherwise qualified" and any arbitrary set of requirements to a tautology.

Pandazides, 946 F.2d at 349. This Court has also held that physical qualifications should be examined to determine whether they are necessary to the position or service in question. *See Davis*, 442 U.S. at 407. Furthermore, this inquiry must be individualized in most cases and based on appropriate findings of fact. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). All FMCSRs pertaining to driver qualifications, including the physical requirements, must therefore measure whether an individual can safely operate a CMV in interstate commerce.

There is compelling evidence that the vision standard does not actually measure a monocular individual's ability to drive safely and that rigid adherence to this standard would discriminate against monocular drivers who can drive safely. The legislative history of the ADA,

studies on monocular vision, and the FHWA's issuance of vision waivers to thousands of qualified monocular drivers indicate that the vision standard by itself cannot be relied on to determine whether monocular drivers are safe.

When Congress passed the ADA in 1990, members of both the House and Senate expressed doubt as to whether FHWA physical requirements were consistent with the ADA and § 504. Congress expected the Secretary of Transportation to "undertake a thorough review of these regulations [FMCSRs] to ascertain whether the [physical] standards conform with current knowledge about the capabilities of persons with disabilities. . . . [and] make any necessary changes within the two year period to bring such regulations into compliance with the law." H. Rep. No. 101-485, Part 2, 101st Cong., 2d Sess. 57 (1990) (House Committee on Education and Labor); *see also* H. Rep. 101-485, Part 3, 101st Cong., 2d Sess. 34 (1990) (House Committee on the Judiciary); S. Rep. 101-116, 101st Cong., 1st Sess. 27-28 (1989) (Senate Committee on Labor and Human Resources).

In response to Congress' concern, the FHWA commissioned Ketron, Inc. to study the relationship between vision deficiencies and safe driving and also reconsidered an earlier study conducted by Bartow Associates, Inc. *See Rauenhorst v. U.S. Department of Trans., Federal Highway Admin.*, 95 F.3d 715, 717-719 (8th Cir. 1996). The Ketron study reported a lack of empirical data upon which to find any correlation between driver safety and vision disorders. *See* Qualification of Drivers, 57 Fed. Reg. 31458 (July 16, 1992) (Notice of Final Disposition). The prior study conducted by Bartow Associates had reviewed the driving studies that had been used in the past to support

the need for 49 C.F.R. § 391.41(b)(10). *See Rauenhorst*, 95 F.3d at 719; Bartow Associates, Inc., *The Monocular Driver: A Review of Distant Visual Acuity Risk Analysis Data* (Sept. 1982) at 1 ("Bartow Study"). The Bartow Study found that many of the previous studies supporting the FHWA's vision standard had been flawed due to "small sample sizes, lack of controls, and the potential dominance of other variables." 57 Fed. Reg. at 6794 (summarizing Bartow Study). Previous studies also failed to recognize that visually impaired drivers learn to drive within their limitations. *Rauenhorst*, 95 F.3d at 719. Furthermore, the findings of the studies supporting the vision standard were misleading since they used test subjects who had not yet learned to compensate for their visual disorders, such as binocular individuals with one eye closed or individuals who had recently been blinded in one eye. Bartow Study at 6, 37-38 & Summary. These studies also failed to consider the monocular driver's ability to use monocular cues. *Id.* at 24.[3] In fact, drivers acquired safe driving records irrespective of their visual acuity. *Id.* at 16. The Bartow Study reveals that some monocular drivers can compensate for limitations in their vision, which is not taken into account by a vision standard that only tests for "good eyesight in both eyes."[4] 57 Fed. Reg. at 6793.

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[3] For instance, Mr. Kirkingburg's doctor testified that people with monocular vision develop "monocular cues" to depth perception and that Mr. Kirkingburg could thus "easily perform the driving tasks required of him." (J.A. 152).

[4] This language appeared in the 1937 version of the vision standard. While the specific formula for the vision standard has changed, it still categorically excludes drivers with monocular vision.

The inherent weakness in the vision standard is further demonstrated by the fact that the FHWA no longer applies it to assess the capabilities of monocular drivers. The FHWA's implementation of a vision waiver program was designed to ameliorate the discriminatory impact of using an absolute vision standard as the sole method by which a driver can obtain a CDL. Faced with Congress' order to revise physical standards that did not comply with the ADA and § 504, the FHWA, on March 25, 1992, announced its intention to accept applications for waivers from the vision requirements for carefully selected qualified individuals. 57 Fed. Reg. 10295. Because the FHWA lacked sufficient empirical data to support the current vision standard as an accurate measure of safe driving, the waiver program was to be a means of certifying monocular drivers the FHWA knew were safe while gathering unbiased data which would provide the basis for a new vision standard. *See id.*

Since the FHWA could not identify a purely physical visual standard that accurately measured safety, the waiver program required monocular drivers to exhibit alternative qualifications which did correlate to driver safety. In fact, the FHWA has stated that these requirements hold monocular drivers to a "slightly higher standard" of safety. *See* 57 Fed. Reg. at 31459. The initial waiver program required monocular individuals to meet a number of requirements, including demonstrating three years of CMV driving experience with: (1) no suspensions or revocations of the individual's driver's license for operating violations in any motor vehicle; (2) no reportable CMV accidents in which the individual was cited for a moving violation; (3) no convictions for a disqualifying

offense under 49 C.F.R. § 383.51 or more than one serious traffic violation under 49 C.F.R. § 383.5; and, (4) no more than two convictions for any other CMV traffic violations. *See id.* at 31460. Further, applicants who obtained waivers were required to report any traffic violations or accidents within 15 days of the occurrence and submit documentation of an annual ophthalmologist's examination that certified the driver's visual acuity was at least 20/40 (Snellen), corrected or uncorrected in the better eye. *Id.* at 31460-61. The reporting requirement thus allowed the FHWA to reassess the waivers it granted to prevent any unnecessary danger to the public.[5] *See* 57 Fed. Reg. at 31460.

Using a proven history of safe driving as a proxy for safe driving ability was consistent with the safety studies the FHWA had already completed. Those studies showed that a crucial issue in safe driving is the ability to recognize one's limitations and then drive within those limitations. *See* Bartow Study at 23. The FHWA therefore reasonably believed that monocular individuals who had proven histories of safe driving had learned to drive within the limitations of their disability and could do so safely. The FHWA further substantiated its position by reissuing findings that monocular drivers who met the criteria of the waiver program and who received waivers did not compromise the safe operation of CMVs. *See* Qualification of Drivers, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994)

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[5] By September of 1994, the FHWA had revoked the waivers of 201 drivers for failing to comply with the reporting requirements. *See* 59 Fed. Reg. at 50890.

(Notice of Final Determination). The standards implemented under the waiver program measured the ability to use visual cues through experience and produced a group of drivers with safety ratings that exceeded those of drivers as a whole. *See* 59 Fed. Reg. at 50890.

The use of alternative safety criteria such as a proven history of safe driving resulted in the FHWA licensing thousands of safe monocular drivers, although the agency drew criticism for its inability to formulate a new vision standard applicable to all drivers.[6] *See* 59 Fed. Reg. at 59389-90. The vision standard itself was not revised since the waiver program's determination that certain monocular drivers were safe was based primarily on criteria not directly related to vision. Thus, while the vision standard could for the time being be used to certify binocular drivers, it did not measure the essential function of safety with regard to monocular drivers.[7]

The history of the FHWA vision standard and the waiver program demonstrates that the rigid vision standard does not accurately measure the essential functions of the job in question and discriminates against individuals with monocular vision. Thousands of monocular

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[6] The FHWA issued 2,411 vision waivers between 1992 and 1994. *See* 59 Fed. Reg. at 50889.

[7] The FHWA indicated that the vision standard would be changed when sufficient data existed to support a non-discriminatory standard that could be applied to all drivers. "The agency's ultimate goal is to adopt driver physical qualification standards that are performance-based; that is, they will reflect the actual physical requirements that fosters safe operation of commercial vehicles." 59 Fed. Reg. at 59390.

drivers have been recognized by the FHWA as safe operators of CMVs in interstate commerce and have demonstrated their ability to drive safely through hundreds of thousands of accident and violation free miles. Without a waiver program these drivers would be denied CDLs on the basis of a physical disability that does not impact their driving skill and the FHWA would be in violation of § 504.

II. ALBERTSONS' REFUSAL TO ACCEPT FHWA VISION WAIVERS DISCRIMINATES AGAINST MONOCULAR DRIVERS IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT.

Like the FHWA, Albertsons cannot rely on the vision standard as an indication of whether Mr. Kirkingburg can perform the essential functions necessary to be a truck driver. Mr. Kirkingburg presented Albertsons with a valid CDL, which confirms his ability to drive safely, and Albertsons cannot refuse to accept that CDL simply because it is held by a monocular driver. By imposing a FHWA vision standard from which the agency has exempted Mr. Kirkingburg, Albertsons is enforcing its own discriminatory physical standards in violation of the ADA. Monocular truck drivers such as Mr. Kirkingburg and *amici* have invested considerable time and financial resources to obtain waivers which reflect their ability to drive safely and increase the job opportunities available to them. Permitting private motor carriers such as Albertsons to categorically reject monocular drivers with valid CDLs makes the waiver provisions meaningless and perpetuates discrimination on the basis of the drivers' disability.

A. The Vision Standard Is An Illegal Criterion Upon Which To Deny A Monocular Driver Employment Since It Does Not Measure A Driver's Ability To Operate A Truck Safely.

As previously discussed, the FHWA would have violated § 504 if it had continued to use the vision standard as the only means of licensing monocular drivers. In this case, since Albertsons has refused to accept Mr. Kirkingburg's waiver, it is doing exactly what the FHWA cannot do: it is applying the vision standard as an absolute and necessary test of an individual's ability to drive safely. Albertsons has therefore violated the ADA, which provides the same protection to individuals with disabilities as does the Rehabilitation Act:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a); *see also Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998) (stating "the directive [42 U.S.C. § 12201] requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.").

As with § 504, an employee must be able to carry out the essential functions of the position to be protected by the ADA. 42 U.S.C. § 12111(8). Albertsons describes compliance with the FHWA standards as one such essential function. *See* Pet. Brief at 35-36. Albertsons is therefore using the vision standard as a necessary criterion for

employment as a truck driver. *Id.* However, having a certain level of visual acuity in both eyes is not an essential function for that job, as the FHWA has recognized. Rather, the essential function of driving a CMV for Albertsons is being able to drive safely in interstate commerce, and Albertsons concedes as much.[8] Nevertheless, Albertsons has chosen to measure the ability of all prospective employees to perform this essential function by requiring them to meet the FHWA's vision standard, even though it has done no independent assessment of whether the standard is "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). It offers no scientific, practical or other evidence to show that monocular drivers are less safe driving Albertsons' trucks than they would be driving anyone else's. Albertsons has simply adopted the outdated FHWA standard.[9]

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[8] Albertsons at various points in its brief has identified the ability to drive safely as a prerequisite, an essential function, and as an affirmative defense. Pet. Brief at 30, 35-36, 38. Regardless of how the ability to drive safely in interstate commerce is categorized, the vision standard must measure whether monocular drivers can drive safely or it is in violation of the ADA.

[9] Albertsons incorrectly claims that it is not required to justify its qualitative standards. *See* Pet. Brief at 33-34. While Albertsons does not have to justify its performance-based standards, it must justify standards which are not consistent with business necessity. *See Pandazides*, 946 F.2d at 349 (stating "[D]efendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified"). The only justification Albertsons offers for requiring compliance with the vision standard is its irrational fear that Mr. Kirkingburg is unsafe. *See* Pet. Br. at 38.

In denying monocular drivers employment because they cannot fulfill a requirement unrelated to the job, Albertsons is essentially asserting that it has a legal right to discriminate against individuals based on "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society." 42 U.S.C. § 12101(a)(7). The ADA specifically prohibits this type of discrimination. The FHWA vision standard, standing alone, does not measure the essential functions of driving a CMV in interstate commerce, and a private employer like Albertsons cannot rely on that standard any more than the FHWA can.

B. A Private Employer Like Albertsons Cannot Ignore The FHWA's Waiver Of The Vision Standard For A Particular Driver.

The FHWA is the federal agency that possesses the expertise and resources to determine the criteria necessary to ensure vehicle and highway safety. Albertsons argues that it can require its drivers to meet the FHWA vision standard regardless of whether these drivers have obtained vision waivers and valid CDLs. Pet. Br. at 30, 33-34. In essence, Albertsons is claiming that it can simply ignore the FHWA's conclusions concerning the vision standard, and substitute its own more stringent standard even if that privately-adopted standard discriminates against persons with disabilities. By refusing to recognize the waiver procedure, Albertsons "cements in place obsolete or inaccurate administrative standards, even when these standards are replaced by new benchmarks which are carefully drafted to assure that improvements and

developments in the equipment of the vehicles and additional developments as to the nature and adaptations to a disability can and do compensate successfully for certain disabilities." *Rauenhorst*, 95 F.3d at 722.

Albertsons' position turns on the argument that actions taken by the FHWA under the statutorily authorized waiver procedure are flawed. However, contrary to Albertsons' assertion, the FHWA's waiver program is not a mere "experiment." *See* Pet. Br. at 13, 41, 44-45. Rather, it is an integral part of the federal highway safety regulatory structure. Albertsons is not free to disregard the FHWA's decision to issue a waiver to Mr. Kirkingburg, since vision waivers are issued pursuant to FHWA regulations that ensure such waivers maintain highway safety. *See* 49 U.S.C. § 31136(e)(1).

When Mr. Kirkingburg re-applied to work at Albertsons, he presented a valid interstate CDL that had been obtained following extensive administrative proceedings at the FHWA. While the FHWA has the authority to promulgate minimum standards requiring that drivers are physically able to operate CMVs safely, *see* 49 U.S.C. § 31136(a)(3), it also has the authority to waive FMCSRs when a waiver is consistent with the public interest and the safe operation of CMVs in interstate commerce. *See* 49 U.S.C. § 31136(e)(1). Waivers issued pursuant to the waiver program were based on each individual's proven ability to drive safely and the FHWA's conclusion that the "level of safety for CMV operations will remain unchanged as a result." 57 Fed. Reg. at 31459. The FHWA announced its intention to accept applications for vision waivers in the Federal Register, detailed the requirements for a successful application, called for comments on the

proposal, responded to comments received, and subsequently announced its decision to grant waivers. *See* 57 Fed. Reg. at 10295; Qualification of Drivers, Waiver Applications, 57 Fed. Reg. 23370 (Jun. 3, 1992) (Request for Comments); 57 Fed. Reg. 31458. The issuance of these waivers is a legally adopted modification of the standard that is necessary to avoid illegal discrimination; it does not, as Albertsons contends, lower the safety requirements. *See* 57 Fed. Reg. at 31459 (stating that in issuing waivers the FHWA "is not relaxing its vision requirements, as contained in the FMCSRs.").

Amici recognize that the FHWA does not prevent an employer from adopting safety standards that are more stringent than those in the FMCSRs. *See* 49 C.F.R. § 390.3(d). However, that does not give private motor carriers a license to discriminate against otherwise qualified drivers with disabilities. *See* 42 U.S.C. § 12112(a). To the contrary, an employer cannot adopt a standard that fails to take into account the particular features of the job at issue *and* the particular abilities of the employee involved. As explained above, Albertsons' new standard ignores the FHWA's finding that the vision standard does not measure the essential functions of this job. It also ignores the fact that the FHWA based its decision to issue Mr. Kirkingburg a waiver on an individualized assessment of his qualifications.[10] *See* 59 Fed. Reg. at 50890 (in discussing the original waiver program the FHWA explained that

[10] The FHWA received 3,700 applications for vision waivers between March 25 and December 31, 1992 but only granted waivers to the 2,411 applicants which it determined were safe. *See* 59 Fed. Reg. at 50888-89.

"individualized determinations were made on the basis of complete data submitted by each applicant, to determine eligibility for participation in the waiver program."). Instead of accepting a FHWA vision waiver, Albertsons relied on a vision standard that the FHWA itself has recognized does not provide for an individual assessment. *See* 57 Fed. Reg. at 10295 (explaining that one purpose of the waiver program was to ultimately establish a "new vision standard that could embrace the concept of 'individual determination' "). Albertsons has provided no evidence that it has made an individual assessment. Albertsons has also failed to show that the actual abilities necessary to drive one of its CMVs differ from the requirements the FHWA imposes before issuing a CDL. Rather than identifying any unique functions of its own jobs, and rather than assessing Mr. Kirkingburg's own abilities, Albertsons simply resorted to "prejudice, stereotypes, or unfounded fear" about disabilities, *Arline*, 480 U.S. at 287, and therefore violated the ADA.[11]

Essentially, Albertsons is seeking judicial review of the waiver program itself. However, if Albertsons had a legitimate argument with the FHWA's waiver program, the proper procedure would have been to challenge the rulemaking directly through administrative proceedings to "modify or repeal the rule itself." *Buck v. U.S. Dept. of*

[11] Albertsons suggests that a waiver of the vision standard is actually an "accommodation" of Mr. Kirkingburg's disability. Pet. Br. at 44-45. But Mr. Kirkingburg needs no accommodation to carry out the essential functions of driving a truck. The FHWA has already determined that he can perform those functions. Thus, the waiver is not an accommodation, but rather the revision of an otherwise discriminatory standard.

Trans., 56 F.3d 1406, 1409 (D.C. Cir. 1995) (stating that plaintiff's challenge of the DOT's refusal to grant waivers from the hearing requirement amounted to an impermissible "collateral attack upon the validity of the hearing requirement itself."); *see also Cousins v. Secretary of U.S. Dept. of Trans.*, 880 F.2d 603, 605 (1st Cir. 1989) (holding that driver seeking to challenge DOT physical qualifications standard must proceed according to the Administrative Procedure Act). Furthermore, judicial review of FHWA rules, regulations, and final orders cannot be properly sought in District Court as Albertsons has attempted to do. *See* 28 U.S.C. § 2342 (Hobbs Act) (stating that Court of Appeals is proper forum for judicial review of DOT rules, regulations, and final orders).

Even if these procedural defects could be overlooked, Albertsons has failed to provide the Court with "[i]nformation, views, arguments, delineating criteria, and statistical data" which support a repeal of the waiver program. *See Cousins*, 880 F.2d at 610. Albertsons has offered no evidence to undermine the FHWA's determination that Kirkingburg is a safe driver; the only support Albertsons does offer is its own assertion that the waiver program was "experimental." Pet. Br. at 44-45. However, the vision waiver program was experimental only insofar as its purpose was to ultimately reform the vision standard. The DOT had yet to determine a standard which could be universally applied without discriminating against safe drivers with visual disorders. The FHWA findings that the drivers who were issued waivers were safe was not experimental in any way. Waivers issued by the FHWA were based on each individual's proven ability to drive safely and the finding that the "level of safety for CMV

operation will remain unchanged as a result." 57 Fed. Reg. at 31459. In fact, the drivers who were granted waivers exceeded the safety ratings of the driving population as a whole. *See* 59 Fed. Reg. at 50890.

Nor can Albertsons rely on the D.C. Circuit's decision in *Advocates for Highway and Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) to support its contention that the waiver program was experimental. The D.C. Circuit vacated the waiver program on August 2, 1994, over a year and a half after Albertsons fired Kirkingburg and then refused to accept his vision waiver. Even if Albertsons could invoke the *Advocates* decision as some sort of *post hoc* rationale for its decision, the FHWA's subsequent regulatory actions negate any defense that *Advocates* might have otherwise offered. The waiver program was vacated only because the FHWA failed to properly document its rationale for considering that vision waivers were consistent with the safe operation of CMVs; the D.C. Circuit's decision was not based on a finding that monocular drivers were unsafe. The court found that the FHWA had provided insufficient evidence in the record in its July 16, 1992 Notice of Final Disposition to support the issuance of vision waivers. *See id.* at 1293-94. After the ruling in *Advocates*, the FHWA quickly rectified its error by publishing additional findings which supported its original waiver determination. *See* 59 Fed. Reg. at 50889-90. The FHWA issued findings which demonstrated a correlation between safe driving history, the main criterion for receiving a waiver, and safe driving ability, the essential function of driving a CMV, based on studies conducted before the waiver program was implemented as well as data obtained during the

waiver program. *See* 59 Fed. Reg. 50887; 59 Fed. Reg. 59386. The FHWA then reinstated the waivers issued under the original waiver program, including that issued to Mr. Kirkingburg. *See* 59 Fed. Reg. 59386.

Finally, any suggestion that the waiver program was "experimental" or otherwise flawed was undercut by Congress' enactment of the Transportation Equity Act for the 21st Century, TEA-21. Pursuant to TEA-21, the DOT may grant renewable two year "exemptions" from minimum safety standards where "such exemption[s] would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption[s]." Pub. L. No. 105-178, Section 4007. The FHWA has continued to issue vision waivers pursuant to TEA-21 using requirements similar to those of the original waiver program. *See* Qualification of Drivers, Exemption Applications, 63 Fed. Reg. 66226 (Dec. 1, 1998) (Notice of Intent to Grant Applications). TEA-21 demonstrates that the FHWA's grant of waivers is not "experimental," but rather is an integral part of the regulatory procedure created by Congress. An employer such as Albertsons cannot ignore the results of that procedure in a way that discriminates against persons with disabilities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS L. PARKER
Counsel of Record
SUNIL H. MANSUKHANI
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave. N.W., Ste. 312
Washington, D.C. 20001
(202) 662-9535

Counsel for Amici Curiae

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